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No.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

H. ALLAN LEGGE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the filing of a criminal complaint triggers an accused's Sixth Amendment right to counsel.

2. Whether the proponent of tape recorded evidence must establish the seven factors set forth in *United States* v. *McKeever* in order to lay a proper foundation under Federal Rule of Evidence 901 for the admissibility of the tape recording.

THE PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were H. Allan Legge, petitioner herein, and Richard Amsterdam.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
THE PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION OF THE SUPREME COURT	2
CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED	2
STATEMENT OF THE CASE	3
A. Preliminary Statement	3
B. Factual Background	4
C. Proceedings in the Second Circuit	10
REASONS FOR GRANTING THE PETITION	
I. This Court Has Explicitly Left Open The Question Whether The Filing Of A Formal Criminal Complaint Triggers An Accused's Sixth Amendment Right To Counsel; This Case Presents An Appropriate Vehicle For The Resolution Of This Important Constitutional Issue	11
A. This Court's Prior Decisions	11
B. Review by this Court Is Warranted	14
1. The Decision of the Second Circuit Is Erroneous	15

Page

2. The Decision of the Second Circuit Is in Conflict With Decisions of Other Courts 19

II. A Conflict Exists in the Circuits As To The Foundation Necessary For The Admission Of A Tape Recording Into Evidence At Trial..... 21

CONCLUSION 26

APPENDIX

Order of the United States Court of Appeals for the Second Circuit Denying Rehearing *En Banc*..... A-1

Opinion and Order of the United States Court of Appeals for the Second Circuit Affirming the Rulings of the United States District Court for the Southern District of New York A-3

Excerpts from Transcript of Trial, 91 Cr. 1012, Before the Honorable Michael B. Mukasey, District Judge, United States District Court for the Southern District of New York A-10

Order of the United States District Court for the Southern District of New York, 91 Cr. 1012 (MBM), Dated July 27, 1992..... A-20

Excerpts from Transcript of July 21, 1992 Pre-Trial Conference Before the Honorable Michael B. Mukasey, District Judge, United States District Court for the Southern District of New York..... A-21

Judgment of the United States District Court of the Southern District of New York, 91 Cr. 1012 (MBM), Filed October 18, 1993..... A-24

TABLE OF AUTHORITIES

	Page
Cases:	
Charpentier v. *State*, 736 P.2d 724 (Wyo. 1987)	15
Edwards v. *Arizona*, 451 U.S. 477 (1981)	11, 12
Forte v. *State*, 707 S.W.2d 89 (Tex. Crim. App. 1986)	20
Green v. *State*, 872 S.W.2d 717 (Tex. Crim. App. 1994)	14
Jones v. *State*, 216 N.W.2d 224 (Wis. 1974)	20
Kirby v. *Illinois*, 406 U.S. 682 (1972)	11, 12, 13, 15, 16
Maine v. *Moulton*, 474 U.S. 159 (1985)	11, 14
Massiah v. *United States*, 377 U.S. 201 (1964)	19
McAlinney v. *Marion Merrill Dow, Inc.*, 992 F.2d 839 (8th Cir. 1993)	22
McNeil v. *Wisconsin*, 501 U.S. 171 (1991)	18
Michigan v. *Jackson*, 475 U.S. 625 (1986)	13
Miffleton v. *State*, 777 S.W.2d 76 (Tex. Crim. App. 1989)	20
Moore v. *Illinois*, 434 U.S. 220 (1977)	12, 13, 14
Moran v. *Burbine*, 475 U.S. 412 (1986)	14, 16
Owen v. *State*, 596 So. 2d 985 (Fla.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 338 (1992)	14
People v. *Anderson*, 842 P.2d 621 (Colo. 1992)	20

	Page
People v. *Hayes*, 564 N.E.2d 803 (Ill. 1990), *cert. denied*, 449 U.S. 967 (1991)	19
People v. *Samuels*, 400 N.E.2d 1344 (N.Y. 1980)	20
Powell v. *Alabama*, 287 U.S. 45 (1932)	11
State v. *Barnett*, 588 N.E. 2d 887 (Ohio Ct. App. 1990)	15, 20
United States ex rel. Robinson v. *Zelker*, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973)	21
United States v. *Biggins*, 551 F.2d 64 (5th Cir. 1977)	23
United States v. *Buchanan*, 985 F.2d 1372 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2727 (1994)	22
United States v. *Cianfrani*, 573 F.2d 835 (3d Cir. 1978)	22
United States v. *Duvall*, 537 F.2d 15 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976)	10, 13, 17, 19, 20
United States v. *Fuentes*, 563 F.2d 527 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977)	23, 24
United States v. *Gouveia*, 467 U.S. 180 (1984)	13
United States v. *King*, 587 F.2d 956 (9th Cir. 1978)	23
United States v. *Kon Yu-Leung*, 910 F.2d 33 (2d Cir. 1990)	17
United States v. *Langley*, 848 F.2d 152 (11th Cir.), *cert. denied*, 488 U.S. 897 (1988)	19

	Page
United States v. *Lively*, 803 F.2d 1124 (11th Cir. 1986)	23
United States v. *McClure*, 786 F.2d 1286 (5th Cir. 1986)	20
United States v. *McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959)	i, 21, 22, 23, 24, 25
United States v. *McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975)	22, 23
United States v. *O'Connell*, 841 F.2d 1408 (8th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989)	23
United States v. *Pace*, 833 F.2d 1307 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011 (1988)	19
United States v. *Smith*, 692 F.2d 693 (10th Cir. 1982)	23
United States v. *Starks*, 515 F.2d 112 (3d Cir. 1975).	22
United States Constitution:	
The Sixth Amendment	*passim*
Statutes and Rules:	
18 U.S.C. § 371	3
18 U.S.C. § 1341 and § 2	3
18 U.S.C. § 3142(a)	18
Federal Rule of Evidence 901(a)	i, 2, 21
Federal Rules of Criminal Procedure 4 and 9	15
Other Authorities:	
5 *Weinstein's Evidence* ¶ 901(b)(5)[02] (1992)	21

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, H. Allan Legge, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix, pp. A3-A9), by order of the court, was not to be reported in the Federal Reporter. The District Court did not issue a written opinion. The pertinent sections of the trial transcript and

transcript of a pre-trial conference reflecting the District Court's rulings are reproduced at pages 10 through 23 of the Appendix.

JURISDICTION OF THE SUPREME COURT

The Court of Appeals for the Second Circuit affirmed the Petitioner Legge's judgment of conviction on June 16, 1994. Petitioner's timely Petition for Rehearing with a suggestion for Rehearing *en banc* was denied on August 12, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND FEDERAL RULE INVOLVED

Constitutional Provision:

The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule:

Federal Rule of Evidence 901(a):

> **(a) General Provision.**
>
> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a

finding that the matter in question is what its proponent claims.

STATEMENT OF THE CASE

A. Preliminary Statement

Indictment 91 CR 1012 was filed in the Southern District of New York on December 17, 1991, naming H. Allan Legge and co-defendant Richard Amsterdam in seven counts. Count One charged Legge and Amsterdam with conspiring between June 1984 and September 1991 to defraud American Credit Indemnity, Inc. ("ACI") of approximately $1.5 million in violation of 18 U.S.C. § 371. Counts Two through Seven charged Legge and Amsterdam with the commission of substantive mail frauds in violation of 18 U.S.C. § 1341 and § 2.

The trial commenced on October 19, 1992. The jury returned its verdict on October 29, 1992, convicting Legge on all counts and Amsterdam on Count One only. Sentence was imposed on October 12, 1993. (A24-A26)[1] Judge Mukasey sentenced Legge to a concurrent forty-eight month term of imprisonment on each of Counts One through Seven. The court also imposed restitution in the amount of $454,750.00. Finally, the court imposed a special assessment of $350.00. Legge is presently incarcerated at the Federal Correctional Institution in Dallas/Fort Worth, Texas.

At trial, a significant part of the Government's case against Legge centered around a September 7, 1991 consent tape recording made of a conversation with Legge by a cooperating Government witness. This tape recording was made without

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[1] References to "A" refer to petitioner Legge's Appendix filed in connection with this petition for certiorari. References to "Tr." in this brief refer to the minutes of the trial proceedings. "GX" refers to Government trial exhibits; "DX" refers to defense trial exhibits.

Legge's knowledge and subsequent to the filing of a formal criminal complaint against him and issuance of an arrest warrant. Furthermore, the tape recording was altered from its original state and there was a five day gap in its chain of custody. Nevertheless, the District Court refused to suppress the tape recording.

Legge appealed from the judgment of conviction on the grounds that 1) the September 7th tape recording should have been suppressed since it was obtained in violation of his Sixth Amendment right to counsel, and 2) the tape recording should not have been admitted into evidence because the Government failed to properly authenticate the tape recording and establish its reliability.

By summary order dated June 16, 1994, the United States Court of Appeals for the Second Circuit affirmed Legge's conviction. (A3) Legge's petition for rehearing and suggestion for rehearing *en banc* was denied on August 12, 1994. (A1)

B. Factual Background

During the relevant time period, Legge was the president of ACI, a credit insurance company with a main office in Baltimore, Maryland and regional offices in other parts of the country including New York. (Tr. 66; 73-74). The prosecution in this case centered on a program created by Legge to meet growing competition in the credit insurance industry by increasing commissions paid to certain categories of brokers who brought credit insurance customers to ACI. (Tr. 78-80; 105-106) This perfectly legitimate plan was called the master broker program. (Tr. 104) It was the theory of the Government's case that Legge used the master broker program to fraudulently divert commissions to selected brokers, who were not legitimately entitled to such commissions under the master broker plan. (Tr. 107-108) According to the Government, these brokers then remitted a significant portion of the commissions to Global Consulting, an entity set up by Seymour Wilson and

controlled by Legge and Wilson. (Tr. 108) Wilson, in turn, transferred a portion of these funds to Legge. (Tr. 108, 574) In this way, approximately $1.5 million in commissions were improperly derived from ACI. (Tr. 572)

The Government presented detailed proof concerning the master broker program but considerably less evidence as to Legge's criminal intent. Indeed, only one witness, Seymour Wilson, the former regional vice-president for ACI in New York and an admitted forger, thief and liar, testified directly about the fraudulent scheme and Legge's supposed knowledge of its illegality. As a result, the Government sought to bolster its case by offering a consent tape recording made by Wilson of a conversation with Legge which supposedly occurred on September 7, 1991, some six weeks after a formal criminal complaint had been filed against Legge. (Tr. 202-205; GX 17) Significantly, it was absolutely clear that this tape recording was altered by Wilson since a 2.9 second gap existed on the tape. (Tr. 193-194; 670-672)

Prior to trial, defense counsel moved to suppress this tape recording on the basis that it had been obtained in violation of Legge's right to counsel since a criminal complaint had already been lodged against him and an arrest warrant issued. (A21-A23) Additionally, defense counsel argued at all stages of the case that the tape recording should have been excluded from evidence because the Government failed to demonstrate by clear and convincing evidence that this altered tape recording was adequately authenticated and reliable. (Tr. 31-34; Tr. 46; Tr. 49; Tr. 101-103; 205; 729-730; 838-849) The motions to suppress were denied (A20, A11-A12, A14-A18) and the District Court admitted the tape recording into evidence over defense objection. (A13) Suffice it to say, the content of the tape was highly prejudicial. It played a crucial part in the Government's case as it was the only occasion on which Legge's voice was heard by the jury since he did not testify at trial.

According to Wilson, in the late Summer or early Fall of 1984, while attending an ACI conference in Baltimore, he and Legge met privately and discussed several topics. Legge supposedly explained to Wilson that he had come up with a plan, the master broker program, to protect ACI's market share from competition by Fidelity & Deposit which was paying its brokers 17-27½% commissions as compared to ACI's standard rate of 5%. According to Wilson, Legge also said that the master broker program could become a blessing for them because they could place brokers into this program who would then return a portion of the commissions to Legge and Wilson. Wilson further testified that Legge indicated that the reason he was sharing this plan with Wilson was because Wilson presided over ACI's largest territory, New York, and had the best control over his sales representatives. According to Wilson, Legge then indicated that he would get back to Wilson when the details were completed. (Tr. 75-81)

Wilson testified that he and Legge next discussed the master broker program at a dinner in New York in December 1984 or January 1985. According to Wilson, Legge said that he had some people in mind to appoint as master broker and that these brokers would keep one third of the 12% commission and remit the remainder to Legge and Wilson. Wilson testified that he asked Legge whether this was legal and that Legge responded that as long as he was President of the company he had the right to implement any program he wanted to and that it was legal. Wilson testified that he felt the arrangement was illegal but agreed to participate out of greed. (Tr. 81-83)

According to Wilson, the way the "offshoot" arrangement worked was that Legge would designate certain master brokers who then had policies assigned to them and received 12% commissions. Once the broker received the 12% commission check, he was to deposit it and remit two-thirds to Legge and Wilson who were to split the proceeds evenly. Wilson testified that Amsterdam, Daniel Sullivan and Arnold Holt were brokers

designated by Legge to participate in this "offshoot" to the master broker program.

Wilson testified that in May 1991, he was called down to Baltimore to meet with two senior vice presidents from ACI to answer a letter from a disgruntled former employee alleging improprieties in the New York office. At this time, Legge was vice-chairman of ACI. Wilson testified that he called Legge in advance and that Legge told him the company knew nothing and he should stonewall. Although the ACI officials did not raise the master broker program with Wilson, Wilson confessed nevertheless because he was concerned that the new owners of ACI, Dun & Bradstreet ("D&B"), would discover the "offshoot." Wilson testified that approximately $1.5 million dollars had been taken pursuant to this scheme and that he repaid approximately $777,000 to D&B in the summer of 1991. This consisted of monies he had in his personal accounts which had previously been in the Global Consulting account. (Tr. 174-184; GX 13A-13E) Wilson testified that he began cooperating with the Government shortly after his confession to the company.

The Tape Recording

In an attempt to bolster Wilson's suspect credibility, the Government offered, over vigorous defense objection, a tape recording of a telephone conversation between Legge and Wilson which Wilson claimed to have recorded on September 7, 1991. The district court admitted this tape into evidence after Wilson identified the voices and testified that the tape fairly and accurately depicted the conversation he had with Legge on that date. (Tr. 202-205) Yet, the testimony of the Government's own witnesses called into question the authenticity and trustworthiness of this tape recording since there was a 2.9 second alteration to the recording and serious inconsistencies in the testimony about the chain of custody with respect to this tape.

Without burdening this Court with a line by line review of this tape recording, its importance to the case against Legge cannot be overemphasized. The Government relied heavily on this tape recording during summation to argue that Legge was encouraging Wilson to stonewall and that he had already primed Sullivan and Holt to do the same. Similarly, the Government argued from the tape recording, *inter alia*, that Legge acknowledged that half the money in a certain account was his and that the money could not be repaid because of the tax implications. (Tr. 924-926) Plainly, this tape recording was highly prejudicial to Legge. Significantly, however, vast doubt was cast about the bona fides of the tape recording by both Government and defense witnesses.

Wilson himself admitted that he caused a couple of seconds of this tape recording to be lost, but denied manipulating the tape. (Tr. 193-194) Wilson also testified unequivocally that immediately after making the tape recording he called FBI Agent Wright to inform him that he had a clear recording and to arrange for the tape recording to be picked up the next day by the FBI. Wright informed him that FBI Agent Zimmerman would pick up the tape at Wilson's office the next morning, *i.e.*, September 8, 1991. (Tr. 264-266; 283-286)

Significantly, Wilson's testimony with respect to how the alteration was made to the tape and as to the preservation of the tape was directly contradicted by the Government's own witnesses. Special Agent Wright testified that he received the September 7, 1991 tape from Assistant United States Attorney Williams on September 12, 1991, not from Zimmerman or Wilson. (Tr. 590-591; DX 14) Moreover, Wright testified that he did not send Zimmerman to pick up this tape. (Tr. 641) Thus, in stark contradiction to Wilson's testimony, Wright testified that there was a five day period before he received custody of this admittedly altered September 7, 1991 tape recording.

The testimony of the Government's tape expert, Robert Brady, confirmed the alteration of the tape recording and put the lie to Wilson's tale as to how the alteration of the tape recording occurred. When Brady was presented with Wilson's story as to how the gap was created, he concluded that the gap could not have occurred in that way. (Tr. 702-704) Brady never wavered from his testimony that the tape had been altered from its original state.

The defense called Henry Putzel, III, Seymour Wilson's attorney, as a witness. Putzel testified that he first learned of the existence of the September 7, 1991 tape recording between Legge and Wilson on Monday, September 9. Putzel recalled receiving the tape recording from Wilson by Federal Express on either September 10, or September 11, 1991. He testified that when he received the tape, the first thing he did was break the tabs so that the tape would not be recorded over and then he made a copy of the tape for himself. He testified that he listened to part of the tape and realized it was significant. He specifically recalled hand carrying the original to the United States Attorney's office either on the day he received it, or the next day, but certainly not later than September 12, 1991. He did not recall hearing a gap on the tape but he said he did not listen to the entire tape recording. (Tr. 754-772) With respect to the chain of custody of this tape, Putzel's testimony flatly contradicted that of his client, Seymour Wilson, who swore that he gave the tape directly to Mr. Zimmerman of the FBI on September 8, 1991.

The defense also called its own tape expert, Ernest Aschkenasy. Aschkenasy testified that there was unquestionably an alteration in the September 7 tape recording. In this respect, Aschkenasy's testimony was entirely consistent with the Government's expert. Aschkenasy, as had the Government expert, explicitly rejected the explanation as to the creation of the gap propounded by Wilson. (Tr. 785-795) Aschkenasy further concluded that the existence of an overrecording was a

deviation from the story of how the tape was made and therefore there was great doubt about the authenticity of the tape recording. (Tr. 799)

C. Proceedings in the Second Circuit

On June 16, 1994, the Second Circuit issued a summary order affirming Legge's conviction. (A3) With respect to Legge's claim that the Government violated his Sixth Amendment right to counsel when Wilson, a Government informant, tape recorded a telephone conversation with him some six weeks after the filing of a sealed criminal complaint, the Second Circuit held that suppression was foreclosed by the court's prior decision in *United States* v. *Duvall*, 537 F.2d 15 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976). In *Duvall*, the Second Circuit had held that the filing of a criminal complaint did not trigger an accused's right to counsel even after arrest. Legge's second argument, that the District Court erred in admitting into evidence the tape recording which had holes in its chain of custody as well as a 2.9 second alteration, was also rejected. The Second Circuit held that the District Court did not exceed its broad discretion in admitting the tape. (A6)

Legge petitioned for rehearing with a suggestion for rehearing *en banc*. The petition was denied on August 12, 1994. (A1) This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

I.

This Court Has Explicitly Left Open The Question Whether The Filing Of A Formal Criminal Complaint Triggers An Accused's Sixth Amendment Right To Counsel; This Case Presents An Appropriate Vehicle For The Resolution Of This Important Constitutional Issue

The question as to whether an accused's Sixth Amendment right to counsel is triggered upon the filing of a criminal complaint was explicitly left open by this Court in *Edwards* v. *Arizona*, 451 U.S. 477, 480 n.7 (1981). As petitioner Legge details below, the issue is now ripe for resolution.

A. This Court's Prior Decisions

The issue of when an accused's right to counsel attaches has merited the attention of this Court on a number of occasions. This Court has not hesitated to recognize that the preservation of the right of an accused to receive a fair trial intrinsically depends on the availability of a lawyer's assistance. *See, e.g., Maine* v. *Moulton*, 474 U.S. 159, 168 (1985). Nonetheless, to date, this Court has left unanswered the question as to whether the filing of a criminal complaint against an individual triggers that person's right to counsel under the Sixth Amendment. Fairly read, this Court's precedents suggest that an accused's right to counsel does attach with the filing of a criminal complaint.

In *Kirby* v. *Illinois*, 406 U.S. 682 (1972), this Court noted that as of the landmark decision in *Powell* v. *Alabama*, 287 U.S. 45 (1932), it has been firmly established that an accused's Sixth Amendment right to counsel attaches once adversary judicial proceedings have been initiated. *Kirby* at 688. This Court, in *Kirby*, then went on to define the "initiation of adversary judicial criminal proceedings" as encompassing a "formal

charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689. The opinion stressed the importance of the initiation of adversary judicial proceedings as the triggering event for the right to counsel to attach because "it is only then that the Government has committed itself to prosecute, and only then that the adverse positions of the Government and defendant have solidified." *Id.* Under this formulation, the term "formal charge" logically encompasses a criminal complaint.

Subsequent to *Kirby*, this Court revisited the issue of triggering events for Sixth Amendment purposes. In *Moore* v. *Illinois*, 434 U.S. 220 (1978), this Court was confronted with a situation in which a suspect, Moore, was identified by a victim as her assailant during a preliminary hearing. Subsequently, Moore was indicted and counsel was then appointed for him. Moore was convicted for the assault and appealed his conviction on the ground that the identification made at the preliminary hearing should have been suppressed since he was entitled to the assistance of counsel at that time. This Court considered and rejected an argument that the right to counsel did not apply because the defendant had not yet been indicted *Id.* at 227-29. After noting this argument, the Court cited the general language from *Kirby* that the right to counsel is triggered by the initiation of formal proceedings "by way of formal charge or preliminary hearing," and stated that *"[t]he prosecution in this case was commenced under Illinois law when the victim's complaint was filed in court."* *Id.* at 228 (emphasis added). The Court then held that Moore's Sixth Amendment rights had been violated. Although the Court was not specifically called upon to decide whether the right to counsel attached at the moment the complaint was filed, the Court clearly viewed the filing of the complaint to be a significant event for Sixth Amendment purposes.

Likewise, in *Edwards* v. *Arizona*, decided in 1981, this Court again implied that the filing of a formal complaint triggers the right to counsel. In that case, a confession was obtained from Edwards after he had been arrested on a warrant

issued pursuant to a complaint. Though the Court ultimately held that the police obtained the confession in violation of Edwards' Fifth Amendment rights, his right to counsel under the Sixth Amendment was also discussed. In a lengthy footnote, the Court indicated that the State had first conceded, and later disputed, that the filing of a criminal complaint constituted the initiation of "adversary judicial criminal proceedings." 451 U.S. 477, 480 n.7. The Court then described in some detail how, under Arizona law, a criminal case could be initiated by a complaint, and summarized the procedures after the filing of a complaint, which are similar to the procedures under the Federal Rules of Criminal Procedure. *Id.* However, since the Arizona Supreme Court had analyzed the propriety of admitting Edwards' confession into evidence under the Fifth Amendment, the Supreme Court declined to decide the issue under Sixth Amendment principles. The Court did, however, note the Second Circuit's decision in *United States* v. *Duvall* as a contrasting authority to compare with its decision in *Moore* v. *Illinois* discussed *supra*.[2] Though ultimately the *Edwards* court declined to reach the Sixth Amendment issue, its extended discussion of the complaint process is difficult to understand if, as suggested in *Duvall*, the event has no constitutional significance.

More recent Supreme Court cases have continued to stress the language from *Kirby* linking the right to counsel to the point when "the Government has committed itself to prosecute, and [when] the adverse positions of Government and defendant have solidified." *Kirby*, 406 U.S. at 689. *See, e.g., Michigan* v. *Jackson*, 475 U.S. 625, 631 (1986); *United States* v. *Gouveia*,

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[2] The Second Circuit affirmed petitioner Legge's conviction on this issue on the basis that *Duvall* constituted controlling precedent to the effect that the filing of a criminal complaint did not trigger an accused's rights under the Sixth Amendment. This Court apparently viewed *Moore* as suggesting otherwise.

467 U.S. 180, 189 (1984). *See also Maine* v. *Moulton*, 474 U.S. 159 (1985).

In 1986, this Court once again articulated that the Sixth Amendment right to counsel attaches at the "first formal charging proceeding." *Moran* v. *Burbine*, 475 U.S. 412, 428 (1986). Significantly, the Court explained that "[b]y its very terms" the Amendment is applicable "only when the government's role shifts from investigation to *accusation*" (emphasis added). Accordingly, under *Moran* the question is whether a formal criminal complaint constitutes a shift to "accusation."

B. Review by this Court Is Warranted

Against the backdrop of this Court's prior precedents, there are a number of reasons a grant of certiorari is warranted at this time. As stated above, the question of whether an accused's Sixth Amendment right attaches with the filing of a criminal complaint was left open by this Court for resolution at a later time. Since this is an issue of significant constitutional moment and is likely to be repeated, as many prosecutions are initiated by criminal complaint, the time is now ripe for consideration by this Court.

Perhaps most importantly, review should be granted because the Second Circuit's ruling that Legge's Sixth Amendment right to counsel did not attach with the filing of the sealed criminal complaint is wrong and inconsistent with this Court's precedents[3] as well as with decisions of other courts.

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[3] The petitioner is not alone in this view. The Court of Criminal Appeals of Texas recently interpreted this Court's decisions to mean that an accused's Sixth Amendment right to counsel attaches with the filing of a criminal complaint. *Green* v. *State*, 872 S.W.2d 717, 720 (Tex. Crim. App. 1994). So did the Supreme Court of Florida in *Owen* v. *State*, 596 So. 2d 985, 989 n.5 (Fla.), *cert. denied*, ____ U.S. ____, 113 S. Ct. 338 (1992) where it construed language in *Moore* v. *Illinois* to mean that "the

(Footnote continued)

1. The Decision of the Second Circuit Is Erroneous

The filing of the criminal complaint against Legge on July 26, 1991, was a "formal charge" that served to initiate criminal proceedings against Legge within the meaning of *Kirby*. It is difficult to imagine what this Court could have meant by "formal charge," other than a complaint, since the Court also explicitly referenced "preliminary hearing, indictment, information or arraignment" in its definition of events constituting the initiation of adversary judicial proceedings. A complaint is functionally equivalent to an indictment; it is the principal alternative to an indictment for initiating a federal criminal prosecution. Fed. R. Crim. P. 4 and 9. As with an indictment, a complaint secures the Government's procurement of an arrest warrant. If an individual named in an indictment and arrest warrant enjoys the protection of the right to counsel, it is difficult to imagine why an individual named in a complaint and concomitant arrest warrant should not enjoy the same protection. In both cases, the judicial process has been invoked, and an order affecting the individual's liberty has issued.

Further, when the complaint against Legge was filed the Government clearly had "committed itself to prosecute." *Kirby*, 406 U.S. at 689. Prior to that date, Legge had been under investigation, and the Government had been gathering evidence in support of possible criminal charges against him. With the filing of the complaint, "the adverse positions of Government

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right to counsel can attach as early as the filing of the complaint in those cases where the complaint serves as the charging instrument."); *See also Charpentier* v. *State*, 736 P.2d 724, 725 (Wyo. 1987) (Wyoming Supreme Court notes that it has applied the rule and rationale set forth by the United States Supreme Court in *Kirby* and has consequently held that the filing of a criminal complaint is the point at which Sixth Amendment rights are triggered); *State* v. *Barnett* 588 N.E.2d 887, 894 (Ohio Ct. App. 1990) (court cites to *Kirby* for proposition that Sixth Amendment rights attach upon issuance of a criminal complaint).

and defendant . . . solidified," *Kirby*, 406 U.S. at 689, and the right to counsel should have therefore attached. Certainly, the complaint set forth an *accusation* against Legge within the meaning of *Moran* v. *Burbine*. Indeed, the adversary nature of the judicial proceedings was starkly illustrated in the caption of the complaint itself: "*United States of America* v. *H. Allan Legge*." The caption would have read no differently had Legge been indicted.

Nonetheless, during his taped conversation with Wilson, Legge was not informed that he had been charged, that Seymour Wilson was acting on behalf of the Government, or that he could consult an attorney. The Government used Wilson as its agent to question Legge without informing him of those facts. This subterfuge presumably was a deliberate Government tactic designed to allow statements to be obtained from Legge without allowing him to learn of his rights.

Under the Second Circuit's ruling, absent indictment, a defendant who has been charged in a complaint and is subject to arrest, is nevertheless open to all forms of Government interrogation without any right to interpose an attorney between himself and his accusers. Thus, an agent armed with an arrest warrant could go to a defendant's home and begin questioning him without disclosing the existence of the pending charge or the arrest warrant. Even if the very first thing said by the defendant was to request a lawyer, the Government could nevertheless use any incriminating statements generated in the course of subsequent questioning. Such would be the case because under the Second Circuit's ruling, the defendant's right to counsel had not attached and, because the defendant was not in custody, his rights under the Fifth Amendment were not triggered.

The problem with the Second Circuit's rule can be demonstrated by superimposing the various arrest scenarios on a straight line continuum. On one extreme is the situation where

a federal agent on the street observes a defendant committing a crime. At that point, the agent has probable cause to arrest without a warrant. What occurs next is rather routine: the agent identifies himself as a Government representative, arrests the defendant, and advises him of his *Miranda* rights. While true that the right to counsel under the Sixth Amendment has not yet attached, the defendant is certainly on notice that he has been confronted by the forces of the Government, that his statements will be used against him and that he has the right to counsel. On the other end of this continuum is the indictment scenario. In that circumstance, the right to counsel has attached even before arrest or arraignment, *e.g.*, *United States* v. *Kon Yu-Leung*, 910 F.2d 33, 38 (2d Cir. 1990), and the Sixth Amendment shields the defendant from Government questioning absent a waiver of the right to counsel. The facts here fall somewhere in between the warrantless arrest and the indictment scenario. It simply does not make sense that the defendant charged in a formal complaint with an arrest warrant issued should not be afforded at least the same protection as a defendant arrested on the street without a warrant.

In *Duvall*, the Second Circuit opined that a rule such as the one proposed here would discourage, rather than encourage, use of the favored warrant procedure. 537 F.2d at 22. This salutary goal of protecting a suspect's constitutional rights through the warrant procedure, however, leads to a seriously anomalous result. A defendant subjected to a warrantless arrest would at least be apprised of his right to counsel in the course of the standard *Miranda* warnings, and could not be questioned by the Government unless he knowingly waived that right. In sharp contrast, under the *Duvall* rule, an accused formally charged in a criminal complaint and supposedly benefiting from the issuance of a warrant, actually receives no constitutional protection whatsoever.

The Second Circuit is wrong for other reasons as well. It draws an artificial distinction between a defendant charged by

indictment and a defendant charged by complaint. This disparity in rights is difficult to justify, when one considers that a defendant charged in a complaint is on essentially equal footing with an indicted defendant—both have been formally charged and both are subject to arrest and, potentially, *preventive detention. See* 18 U.S.C. § 3142(a). If one can be held without bail on a complaint, *a fortiori*, the complaint must be considered both an "accusation" and a "formal charge."

We recognize, of course, that the use by the Government of a cooperating individual is a legitimate and permissible investigative technique. Similarly, we do not dispute the Government's right to investigate and use its cooperators to obtain consensual tape recordings. Nevertheless, the Government's investigative desires are hardly a touchstone for constitutional jurisprudence;[4] the Sixth Amendment, and the constitution in general, place limits on the extent to which the

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[4]Although true that the interests of the government in investigating crimes often clashes with the protections afforded by the constitution, courts should be wary of unbridled government power and discretion. As succinctly set forth by Justice Stevens:

> Undergirding our entire line of cases requiring the police to follow fair procedures when they interrogate presumptively innocent citizens suspected of criminal wrongdoing is the longstanding recognition that an adversarial system of justice can function effectively only when the adversaries communicate with one another through counsel and when laypersons are protected from overreaching by more experienced and skilled professionals. Whenever the Court ignores the importance of fair procedure in this context and describes the societal interest in obtaining "uncoerced confessions" from pretrial detainees as an "unmitigated good," the Court is revealing a preference for an inquisitorial system of justice.

McNeil v. *Wisconsin*, 501 U.S. 171, 181 (1991) (Stevens, J., dissenting).

Government may use particular evidence-gathering procedures. For example, in *Massiah* v. *United States*, the authorities used a cooperating informant to obtain incriminating statements from the defendant while his case was pending. 377 U.S. 201, 202-03 (1964). The Government attempted to justify its conduct with the assertion that it had a "right" and "duty" to continue its investigation of the defendant's criminal conduct. The Supreme Court acknowledged the propriety of continued investigation, but held that the defendant's statements had been obtained in violation of the Sixth Amendment, and could not be used against him. *Id.* at 206-07. As *Massiah* illustrates, the Government's legitimate interest in investigation is necessarily circumscribed by the constitution.

2. The Decision of the Second Circuit Is in Conflict With Decisions of Other Courts

Another important reason this Court should grant *certiorari* is that the decision below is in conflict with decisions in a number of other lower courts. Alternatively stated, various federal and state courts have disagreed on whether the filing of a complaint triggers an accused's Sixth Amendment rights.

As discussed above, beginning with its decision in *Duvall*, the Second Circuit has held that an accused's right to counsel does not attach with the filing of a criminal case. The Ninth and Eleventh Circuits have followed *Duvall*. *See United States* v. *Pace*, 833 F.2d 1307 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011 (1988); *United States* v. *Langley*, 848 F.2d 152 (11th Cir.), *cert. denied*, 488 U.S. 897 (1988). In contrast, various state courts have held that the filing of a criminal complaint does trigger a defendant's constitutional right to counsel. For example, the Illinois Supreme Court has held that the filing of a criminal complaint by a prosecutor can signal the onset of formal adversarial proceedings triggering an accused's right to counsel. *People* v. *Hayes*, 564 N.E.2d 803, 817-818 (Ill. 1990), *cert. denied*, 449 U.S. 967 (1991). In New York, a defendant's

right to counsel attaches when a felony complaint is filed. *People* v. *Samuels*, 400 N.E.2d 1344, 1346 (N.Y. 1980). In Wisconsin, the Sixth Amendment right to counsel attaches at the time a defendant is formally charged with a crime by warrant or complaint. *Jones* v. *State*, 216 N.W.2d 224, 227-228 (Wis. 1974). Similarly, several decisions in the Texas Criminal Court of Appeals have held that adversary judicial proceedings commence when a complaint is filed. *Miffleton* v. *State*, 777 S.W.2d 76, 78 (Tex. Crim. App. 1989); *Forte* v. *State*, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986). *See also United States* v. *McClure*, 786 F.2d 1286, 1290 (5th Cir. 1986) (right to counsel held not to have attached because "no complaint had been filed and no indictment had been returned"); *People* v. *Anderson*, 842 P.2d 621, 623 (Colo. 1992) (proceeding at issue did not constitute an initiation of an adversary judicial proceeding for Sixth Amendment purposes because no "complaint/information or indictment had been filed"); *State* v. *Barnett*, 588 N.E.2d 887, 893-894 (Ohio Ct. App. 1990) (court found that appellant's right to counsel had attached prior to a surreptitious tape recording of his conversation with a government informant "even though an indictment had not been returned as of that date since a criminal complaint, as well as an arrest warrant had already been issued"); and discussion *supra* at note 3.

Indeed, even *Duvall* was somewhat anomalous at the time it was decided. Only a few years before *Duvall*, in the context of a New York State prisoner's petition for a writ of *habeas corpus*, the Second Circuit held that the right to counsel attached when the arrest warrant was issued:

> Here the arrest warrant itself commanded that appellant be brought forthwith before the Criminal Court "to answer the said charge, and to be dealt with according to the law." These were formal criminal proceedings, for the warrant had been signed by a judge based on an "information upon oath" that appellant did

> commit the crimes of assault, robbery and possession of a dangerous weapon. This being true, . . . counsel [was required] at the show-up.

United States ex rel. Robinson v. *Zelker*, 468 F.2d 159, 163 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973).

Accordingly, by granting *certiorari*, this Court would be able to provide a uniform rule on this important constitutional issue.

II.

A Conflict Exists in the Circuits As To The Foundation Necessary For The Admission Of A Tape Recording Into Evidence At Trial

As described above, the September 7th tape recording was a crucial piece of evidence in the Government's case against Legge. This tape recording, however, indisputably contained a 2.9 second alteration created by the principal Government witness, Seymour Wilson. Moreover, there were significant flaws in the preservation of this tape recording. Notwithstanding these demonstrable problems with the tape recording, the district court admitted it into evidence. The United States Court of Appeals for the Second Circuit held that the district court did not exceed its broad discretion in admitting the tape recording.

A conflict exists in the circuits as to the requisite foundation under Rule 901 of the Federal Rules of Evidence for the admission of tape recordings into evidence. *See* 5 *Weinstein's Evidence* ¶ 901(b)(5)[02] (1992) at 89-92.

In the seminal case of *United States* v. *McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959), the district court established a seven factor test for determining the admissibility of a tape recording. These factors are:

(1) That the recording device was capable of taking the conversation offered in evidence.

(2) That the operator of the device was competent to operate the device.

(3) That the recording is authentic and correct.

(4) That changes, additions or deletions have not been made in the recording.

(5) That the recording has been preserved in a manner that is shown to the court.

(6) That the speakers are identified.

(7) That the conversation elicited was made voluntarily and in good faith, without any kind of inducement.

169 F. Supp. at 430.

This list of requirements has been explicitly adopted and applied by the Third and Eighth Circuits. *See, e.g., United States* v. *Starks*, 515 F.2d 112, 121 n.11 (3d Cir. 1975) (Court adopts the *McKeever* factors and finds that the district court erred in admitting a tape recording due to, *inter alia*, problems with its chain of custody); *United States* v. *Cianfrani*, 573 F.2d 835, 842-44 (3d Cir. 1978) (tape recording was admissible because the seven *Starks* requirements were met); *United States* v. *McMillan*, 508 F.2d 101, 104 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975) (Court follows the *McKeever* requirements and finds that the elements at issue were satisfied); *United States* v. *Buchanan*, 985 F.2d 1372, 1378-79 (8th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 2727 (1994) (the Government adequately satisfied the seven foundational requirements for admission of the tape recording); *McAlinney* v. *Marion Merrill Dow, Inc.*, 992 F.2d 839, 842 (8th Cir. 1993) (Court properly excluded tape recording from evidence due to serious issues

concerning whether changes, additions or deletions had been made); *United States* v. *O'Connell*, 841 F.2d 1408, 1420 (8th Cir. 1988), *cert. denied*, 488 U.S. 1011 (1989) (*McMillan* factors will be strictly applied when tape recording is made by the Government or at the Government's instance. The factors will be applied flexibly when the recording is made by a defendant.). Accordingly, in the Third and Eighth Circuits, the Government is required to satisfy each of the seven foundational elements originally set forth in *McKeever* as a prerequisite to the admissibility of a tape recording.

In contrast, the Second, Fifth, Ninth, Tenth, Eleventh and District of Columbia circuits have adopted a less mechanical approach and do not require a strict adherence to the *McKeever* factors. These circuits have accorded broad discretion to the district courts to decide whether tape recordings should be admitted into evidence based on general considerations as to the accuracy, authenticity and trustworthiness of the tape-recorded evidence. *See, e.g., United States* v. *Fuentes*, 563 F.2d 527, 532 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977) (The court indicated that while it viewed the *McKeever* factors as valuable guideposts, the "varying circumstances of particular cases . . . militate against our adoption of inflexible criteria applicable to all cases"); *United States* v. *Biggins*, 551 F.2d 64 (5th Cir. 1977) (the court neither adopts nor rejects the *McKeever* test as a whole; the trial court's "discretion to admit the evidence is not to be sacrificed to a formalistic adherence to the standard we establish"); *United States* v. *King*, 587 F.2d 956, 961 (9th Cir. 1978) (the court rejects strict adherence to the *McKeever* foundational requirements and focuses on authenticity and general trustworthiness); *United States* v. *Smith*, 692 F.2d 693, 698 (10th Cir. 1982) (court rejects rigid adherence to *McKeever* test citing *Fuentes* and *Biggins*; accuracy of the recording is the crucial issue); *United States* v. *Lively*, 803 F.2d 1124, 1129 (11th Cir. 1986) (court focuses on the trustworthiness of the tape recording and affirms its admission notwithstanding a seven second gap).

This petition presents an opportunity for this Court to resolve a circuit split on an important evidentiary issue. Wiretap and consent tape recordings are now commonly used by the Government in criminal prosecutions. The Second Circuit has aptly noted that "recorded evidence is likely to have a strong impression upon a jury and is susceptible to alteration." *United States* v. *Fuentes*, *supra*, 563 F.2d at 532. Consequently, the admissibility of such powerful, and easily manipulated, evidence should not turn on the mere happenstance of the particular circuit in which a prosecution is occurring. By resolving the circuit split and creating a uniform standard for the admission of tape recorded evidence, this Court would advance the cause of fairness in the administration of criminal justice.

In petitioner Legge's case, this is not a matter of theoretical interest. In contrast to the Second Circuit's ruling in this case, under a strict application of the *McKeever* requirements, the September 7th tape recording should not have been admitted into evidence. The Government's own witnesses, including its proffered tape expert, admitted that a 2.9 second deletion was made to the recording. Moreover, at various points, the district court stated its view that the tape recording had been the subject of tampering. In any event, due to the uncontroverted evidence that the tape recording was altered, one of the foundational requirements for admission into evidence under *McKeever* was not met.

Furthermore, there were demonstrable problems with the chain of custody with respect to this tape recording. The Government's chief witness, Seymour Wilson, concocted an account as to how he supposedly transferred the tape recording directly into F.B.I. custody. Specifically, Wilson testified that he called Agent Wright on September 7 and that Wright instructed him that Agent Zimmerman would pick up the tape recording at Wilson's office the following day. Wilson further testified that he gave the recording to Zimmerman on September 8 as planned. In stark contrast, F.B.I. Agent Wright testified that he

received the recording from Assistant United States Attorney Williams on September 12. Additionally, Wilson's attorney testified that he received the original recording from his client by Federal Express on September 10 or 11. According to Wilson's attorney, he then personally delivered the recording to the United States Attorney's Office on either September 11 or 12. Thus, there was a five day interregnum in the chain of custody between the time the recording was made until it was vouchered into F.B.I. custody. Once again, one of the foundational requirements under *McKeever* was not satisfied.

Accordingly, this case presents an appropriate vehicle to resolve the circuit split over the necessary foundation for the admission of tape recorded evidence. This is an issue of great evidentiary moment in federal and state courts across the nation as well as to the petitioner individually.

CONCLUSION

For the reasons contained herein, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit in the captioned matter.

Respectfully submitted,

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(212) 878-8000
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
New York 10007

GEORGE LANGE III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of August one thousand nine hundred and ninety-four.

UNITED STATES AMERICA,

Appellee,

V.

Dkt No: 93-1727
and 93-1730

H. ALLAN LEGGE and RICHARD AMSTERDAM

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the counsels for appellant, H. Allan Legge.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

by: /s/ Carolyn Clark Campbell
Carolyn Clark Campbell
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of June, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE JON O. NEWMAN,
Chief Judge.

HONORABLE J. EDWARD LUMBARD,
HONORABLE JAMES L. OAKES,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

93-1727
93-1730

H. ALLAN LEGGE and RICHARD AMSTERDAM,

Defendants-Appellants.

ORDER

Appeal from the United States District Court for the Southern District of New York (Michael B. Mukasey, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgments of the District Court be and they hereby are AFFIRMED.

H. Allan Legge and Richard Amsterdam were charged with one count of conspiracy to commit mail fraud in violation of 18 U.S.C. § 371 and six counts of mail fraud in violation of 18 U.S.C. § 1341. Following a jury trial, Legge was convicted on all counts and Amsterdam was convicted on the conspiracy count.

1. Legge contends that the Government violated his Sixth Amendment right to counsel when Seymour Wilson, a Government informant, called him to elicit incriminating statements on September 7, 1991, almost two months after the Government had filed a sealed complaint charging Legge with mail fraud. This argument is foreclosed by our decision in *United States v. Duvall*, 537 F.2d 15 (2d Cir.), *cert. denied*, 426 U.S. 950 (1976), in which we held that the filing of a federal complaint did not give rise to a right to counsel even when the individual named in the complaint was arrested. Legge first attempts to distinguish *Duvall* on the ground that in that case the uncounseled contact occurred after the defendant was given *Miranda* warnings. In the instant case, the uncounseled contact was not preceded by any *Miranda* warnings. However, the *Miranda* warnings in *Duvall* were necessary because the defendant was in custody following an arrest. Here, there was no arrest. The reasoning in *Duvall* did not turn on the fact that the defendant had received *Miranda* warnings.

Legge alternatively suggests that recent cases require us to reconsider our holding in *Duvall*. He points out that in *Moran*

v. Burbine, 475 U.S. 412, 430 (1986), the Court said that the right to counsel attaches "when the government's role shifts from investigation to accusation." And he argues that the Court has in recent cases stressed the teaching *of Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion of Stewart, J.), that with "[t]he initiation of judicial criminal proceedings[,] ... the government has committed itself to prosecute, and only then [have] the adverse positions of government and defendant [] solidified." *See, e.g., Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Gouveia*, 467 U.S. 180, 189 (1984). In *Duvall*, Judge Friendly fully considered this instruction in *Kirby* and nevertheless held that the right to counsel did not attach upon an arrest pursuant to a complaint. Furthermore, the statement in *Moran* that the right to counsel attaches upon an "accusation" does not case any doubt on *Duvall*'s soundness. By "accusation," the Court meant "the initiation of adversary judicial proceedings," which it believed were "fundamental to the proper application of the Sixth Amendment right to counsel." *Moran*, 475 U.S. at 431. Judge Friendly understood that the right attached upon the initiation of formal judicial proceedings against the defendant, which required more than a complaint. Finally, we have reaffirmed the continuing validity of the holding in *Duvall* in two recent cases. *See United States v. Smith*, 778 F.2d 925, 932 (2d Cir. 1985); *United States v. Guido*, 740 F.2d 675, 676 (2d Cir. 1983); *see also United States v. Pace*, 833 F.2d 1307 (9th Cir. 1987).

Legge also contends that the Court exceeded its discretion in allowing the Government to admit the September 7, 1991, tape recording into evidence. He argues that a 2.9 second gap in the recording and conflicting stories about the audiotape's chain of custody demonstrated that the tape was inadequately authenticated, and thus could not be admitted under Federal Rules of Evidence 901. In order to admit the tape, the Federal Rules of Evidence require that there be "evidence sufficient to support a finding that the matter in question is what the proponent claims."

Fed. R. Evid. 901(a). We believe that the Court could properly have found that the Government had met this requirement and produced "clear and convincing evidence of authenticity and accuracy." *United States v. Ruggiero*, 928 F.2d 1289, 1303 (2d Cir.), *cert. denied*, 112 S.Ct. 372 (1991). The questions raised by Legge about the possibility of tampering presented issues of credibility that were before the jury. The Court did not exceed its "broad discretion" in admitting the tape. *See United States v. Mendel*, 746 F.2d 155, 167 (2d Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985).

Legge's final contention that the District Court erred in refusing certain jury charges regarding the tape evidence also fails. Legge claims that the Court should have instructed the jury (1) that the 2.9 second gap was created by Wilson and (2) that the tape evidence should be scrutinized with care. First, whether or not the gap was created by Wilson was an issue of fact upon which the Court properly declined to instruct the fact-finder. Second, we do not believe that the Court's failure to give an instruction regarding authenticity or an instruction directing the jury to scrutinize the audiotape with care exceeded its discretion.

2. Amsterdam makes several claims of errors that he believes warrant reversal of his conspiracy conviction. Because Amsterdam failed to complain about any of these alleged errors before the District Court, he urges that his conviction should be reversed because the errors were plain or because his trial counsel offered ineffective assistance in not pointing out the alleged errors in a timely manner.

First, Amsterdam contends that the Court plainly erred in allowing Government witness Seymour Wilson to offer lay testimony on issues of law. We see no error because Wilson did not testify on issues of law, but rather on factual issues dealing with ACI's procedures and policies regarding the payment of commissions to brokers.

Second, Amsterdam argues that the Court plainly erred in failing to instruct the jury on certain principles of contract law. He says that the Court should have instructed the jury that Amsterdam had the right to assume that ACI had legitimate reasons for appointing him to be the master broker on accounts he had not sold. Amsterdam also says that the Court should have instructed the jury that there could be consideration for his receipt of brokerage commissions based on his availability to service the accounts. Amsterdam believes that if the Court had given these instructions to the jury, then the jury might have acquitted on the theory that Amsterdam might not have understood that he was entering into a scheme to defraud ACI. We disagree. Amsterdam does not dispute that the Court properly instructed the jury as regards the *mens rea* necessary for the crime of conspiracy. The jury's verdict of guilty on the conspiracy count demonstrates that it believed that Amsterdam had the *mens rea* required for the crime. Moreover, even if contract law-based instructions might have been acceptable, the Court did not plainly err in failing to construct such a novel defense theory on Amsterdam's behalf when he did not request it.

Third, Amsterdam believes that the evidence offered against him was insufficient to prove the charge for which he was indicted. According to the indictment, Amsterdam conspired with Legge to defraud the American Credit Indemnity Co. ("ACI") of approximately $1.5 million. The indictment charged that Amsterdam received commissions for accounts on which he "performed no services" and that he "kicked back" a portion of those commissions to "a dummy corporation set up by defendant H. ALLAN LEGGE and Seymour Wilson." The evidence amply demonstrated Amsterdam's guilt. The Government's evidence included taped conversations in which Amsterdam and Legge discussed the explanation Amsterdam would offer if questioned as to his involvement in the scheme. Wilson's testimony demonstrated that Amsterdam was a knowing partner in the conspiracy. Bank

records showed that Amsterdam received 128 ACI commission checks for a total of $681,000. In order to reduce the risk of discovery, Amsterdam received the fraudulent commissions through five different companies, all of which he controlled. The evidence also showed that Amsterdam remitted $530,000 to Wilson at Global Consulting, and that Wilson then distributed to Legge his share of the proceeds.

Fourth, Amsterdam argues that the jury's verdict required a "constructive amendment" of the indictment. According to the indictment, Amsterdam improperly received brokerage commissions on accounts on which he performed no services, and he shared these commissions with Legge and Wilson. Amsterdam argues that if the jury had been properly instructed that he was legitimately appointed to be a master broker and therefore legitimately received commissions, the jury could not have concluded that he was guilty of the conspiracy charged in the indictment. This argument is meritless. As stated above, the Court did not err, let alone plainly err, in not instructing the jury that Amsterdam was legitimately appointed. That was an issue of fact properly reserved for determination by the fact-finder. The jury verdict required no amendment of the indictment: there was sufficient evidence to convict Amsterdam on the theory charged in the indictment.

Fifth, Amsterdam claims that the jury's verdict was inconsistent because it found him guilty of the conspiracy charge, but acquitted him on the substantive fraud charges. He urges that we should not apply the general rule that apparently inconsistent verdicts do not require reversal, *see United States v. Powell*, 469 U.S. 57, 64-69 (1984), because of a jury request for clarification on whether Amsterdam could be found liable for the substantive mail fraud offenses if, at the time he received the commission checks, he did not know that the checks were the product of an illegal scheme between Wilson and Legge. The Court responded by instructing the jury that Amsterdam could be found liable for the substantive offenses

only for those checks that he received after he knew of the fraudulent scheme. Amsterdam believes that the jury's verdict of acquittal on the substantive charges demonstrates that it really believed that Amsterdam did not enter into the conspiracy. However, as in any case involving inconsistent verdicts, we have no more basis for assuming that the jury was mistaken in its verdict of guilty than that it was mistaken in its verdict of not guilty. The inconsistency does not warrant relief.

Amsterdam's sixth argument, that the audiotape of the phone conversation he had with Legge was inadmissible hearsay, fails because it rests on the already-rejected ground that the jury was not properly instructed on issues of contract law.

Finally, we reject Amsterdam's claim that he received ineffective assistance of counsel. We believe trial counsel followed " 'sound trial strategy,' " and that his conduct fell well within "the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (citation omitted). Indeed, counsel was well-advised to avoid many of the frivolous arguments Amsterdam makes on appeal.

/s/ J.O. Newman
Chief Judge.

/s/ J. Edward Lumbard

/s/ James L. Oakes
Circuit Judges.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIEF UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

V. S 91 Cr. 1012

H. ALLAN LEGGE and RICHARD AMSTERDAM,

Defendants.

Before:

HON. MICHAEL B. MUKASEY,

District Judge

EXCERPTS FROM TRIAL TRANSCRIPT

THE COURT: I don't usually like to hide the ball, but I really want to see it fleshed out. I don't mean that, there is no pun intended there.

As I understand Mr. Fischetti's position, it is that Mr. Wilson's entire career at ACI was a fraud from day one, and that he was constantly involved in dishonesty, of which this is a piece.

I don't know that its all that harmful or prejudicial either way, but I would like to see how that developed before I make a ruling on whether it is or isn't admissible.

MR. WILLIAMS: It's the government's intention, as I'm sure many an Assistant has done before, to elicit Mr. Wilson's

bad acts and improprieties while being employed at ACI, which is why I am concerned about it at this time.

THE COURT: I understand your strategic concern. But I can't solve your problem for you.

MR. WILLIAMS: I understand.

MR. FISCHETTI: Judge, Mr. Wilson tells me he intends to play the tape, the September 7 tape, 1991 tape between Mr. Legge and Mr. Wilson. Your Honor knows we intend to try and persuade the court that that is inadmissible and not reliable and shouldn't be given to the jury, and we are going to cross on that and we are going to perhaps offer evidence on our case. The purpose being that your Honor has indicted that, and I think we agree that the tape will be introduced with our objection standing. I would like to put that on the record, if I may, so I don't have to object during the introduction of the tape. Then your Honor will make a ruling later on.

THE COURT: Why can't you get up and say "objection" and I will say "overruled"?

MR. FISCHETTI: If your Honor knows what the objections is.

THE COURT: I understand what the objections is going to be. It isn't anything yet.

MR. FISCHETTI: We are going to have a hearing on it. You might remember the government decided not to have a hearing.

THE COURT: You said you will put in evidence on it. As far as I'm concerned, once they establish through a witness that the tape was made and that it actually reflects the conversations, it is admissible. No doubt about that. If you want to introduce evidence later on that suggests that it was tampered

with, it may do you more good to get that evidence in and keep the tape in than it would be to strike the whole thing. But we will deal with that when the time comes.

If it turns out it has been tampered with, it may be that you will have a mistrial motion. Sufficient unto the day is the evil thereof.

MR. ROSS: With respect to the tape, I also will be making an objection I made in advance of trial. There are statements in that tape that Mr. Legge is supposed to have made with respect to getting to Richard. I have made a severance motion based on those statements and asked that your Honor redact them, if you aren't going to sever Mr. Amsterdam. I just wanted to alert the court that that was my objection.

THE COURT: I don't have to be alerted. You took the position that the statement should have been redacted. The government took the position they were in furtherance of the conspiracy.

I decided, based on Beechnut and other cases that they are in furtherance of the conspiracy, and it is in.

MR. ROSS: Fine.

MR. WILLIAMS: Do you want Mr. Wilson on the stand?

THE COURT: Please. <T>

SEYMOUR L. WILSON, resumed.

(Jury present)

THE COURT: Good morning, ladies and gentlemen.

I know this is not the easiest town to get around in, but obviously we can't start until everybody is here, so I would appreciate it if everybody made an effort to try to

* * *

Q And is the transcript a fair and accurate depiction of what's on the tape?

A Yes, it is.

MR. WILLIAMS: Your Honor, at this time, the Government offers 17 AND 17-T, and 16 and 16-T into evidence and would like to play them.

MR. FISCHETTI: Object.

MR. ROSS: Similar, your Honor. And I'd also request that instruction with respect to the transcript.

THE COURT: Okay. The objections are overruled.

Ladies and gentlemen, with respect to the transcripts, you either have been given or are going to be given transcripts of the tapes that you will listen to. What I want to tell you is that the evidence is what's on the tape, not what's on the transcript. The transcript is only an aid to you in listening to the tape.

So that if there's any difference between what you hear on the tape and what you see on the transcript, it's the tape that's the evidence, not the transcript. I'm not saying there is any such difference. I have no idea whether there is or not. But, again, the evidence is the tape. The transcript is only an aid to you in listening to the tape.

MR. ROSS: Thank you, your Honor.

THE COURT: Are you going to distribute transcripts?

* * *

THE COURT: I guess you won't answer my question

MR. FISCHETTI: Your Honor, could I focus you on the legal argument?

My legal argument, if your Honor finds, as your Honor has, that the tape has been tampered with for a 2.9 second gap, has been tampered with, I don't see how your Honor can allow that tape into evidence. You are putting —

THE COURT: I have allowed it into evidence.

MR. FISCHETTI: You have allowed it into evidence for a limited purpose until we had all the evidence on the tape.

THE COURT: Now all the evidence is in, and it was quite clear to me from the government's own case that Wilson fooled around with the tape.

MR. FISCHETTI: My argument is that warrants suppression of the tape. I will just say this, Judge. Your Honor is saying no. I will just say this also. In the event, and I know your Honor is not but I must say this for the purpose of the record. In the event your Honor is to any extent concerned that if your Honor suppressed the tape now it would cause a mistrial or another trial —

THE COURT: No. come on, look.

MR. FISCHETTI: I wanted to point out, we made a motion early on.

THE COURT: I understand that. I call balls and strikes here depending on where I see the ball. I don't care about a

mistrial or a retrial. I have mistried cases. I have retried cases. I have been reversed. And in all three instances — and I have been affirmed. In all four of those instances my paycheck at the end of the month was in exactly the same amount. Makes no difference.

MR. FISCHETTI: I understand. Thank you.

THE COURT: I don't care about the time or the wasted effort, if that's what it is. I don't know that on this record, assuming the facts are as I believe them to be, that that warrants suppression of the tape. It warrants an argument about what he did with the tape. That's for the jury to decide. And it is quite clear to me he got up on that witness stand and lied like Ananias about that.

MR. FISCHETTI: All right, Judge, we just may have a disagreement on what your Honor should do if your Honor determines someone has tampered with the tape.

THE COURT: All right, Mr. Williams, do you want to argue this?

MR. WILLIAMS: Your Honor, I would submit he did not tamper with the tape.

THE COURT: You believe that cock and bull story about his wife interrupting him? Do you?

MR. FISCHETTI: I think that's his rebuttal case.

MR. WILLIAMS: Your Honor, let —

THE COURT: If you do, there is a lovely bridge out there I would like to sell you.

MR. WILLIAMS: Your Honor, let me point one thing out to the court. It may or may not be dispositive.

Just prior to the gap Legge says, "No. Hey Sy, both of us." If Wilson was screwing around with the tape, that would be obliterated.

THE COURT: No. If he was as deaf as he wanted to be, it would have been obliterated also. He wasn't.

MR. WILLIAMS: But you can't miss that, your Honor. It is relevant to the case.

THE COURT: You can't miss it.

MR. WILLIAMS: It clearly indicates, your Honor, what Mr. Legge's response was to Sy Wilson's statement, "You are the brains."

And what I was saying is if Wilson wanted to make certain that there was no implication that he was Legge's equal in the scheme, that would have been completely eliminated.

THE COURT: He would have done a better job.

MR. WILLIAMS: That's essentially what I am arguing.

THE COURT: His reflexes aren't what they used to be.

MR. WILLIAMS: If what they will argue is he had this tape for a five day period, he had all this opportunity —

THE COURT: The testimony is he had it for about a day.

MR. WILLIAMS: What the defense is attempting to argue is he had it for enough time to do something to the tape. What I'm arguing, if he is as —

THE COURT: Let's assume he tries to do it. He goes back over it, sees he didn't do a neat job and then is in a bit of a quandry because if he does it again, then you've got two

stops and two signatures at that point. At which point he is in very, very hot water. Hotter water than he is in already.

MR. WILLIAMS: All Wilson had to do was erase 30 seconds before that. Most of the incriminating statements occurred before the gap. All he had to do was erase to the 30 seconds prior to the "brains" statement and the 30 seconds after and lie and say, hey, there was a tape malfunction.

I'm saying there is evidence or the inference can be drawn from the record which support the government's theory that —

THE COURT: I guess they can and you are drawing them.

MR. WILLIAMS: I understand you don't buy them, your Honor.

THE COURT: I hadn't thought of some of then, I suppose, but I still don't buy them.

MR. WILLIAMS: Your Honor, I can tell you, no one knows Mr. Wilson better than I do, and I understand what kind of person he is. As you know, the government doesn't pick their witnesses. We kind of get stuck.

THE COURT: I have heard that summation too. You delivered it a couple of times.

MR. WILLIAMS: There are inferences that can be drawn from the transcript itself and the way it happened, the way the gap happened, which supported the government's theory it wasn't tampered with, so before you make an absolute finding you believe it was a clear case of tampering by Mr. Wilson, I would ask you to consider some of the things I have thrown out to you. I think what they do is they show there is fair support for the government's belief.

THE COURT: I think there is some support for the view that it was, I suppose, an accident, although certainly it didn't happen the way Mr. Wilson testified it happened. However, Mr. Wilson was pursuing an agenda with more than one entity at the time. The government was one. Dun & Bradstreet is another. I still think he tampered with the tape.

MR. WILLIAMS: I understand.

THE COURT: I'm still going to admit it.

What else do we have?

MR. FISCHETTI: Judge, I would like to know about the rebuttal witness.

MR. WILLIAMS: Your Honor, rebuttal is as follows. There is humming on the tape both at the 2.9 second gap and at the end of the tape. Mr. Aschkenasy did not, was unable to identify it. I picked it up in his notes once I got the 3500 material on, I believe, was it Friday I got the 3500 material. I picked up on the hum.

THE COURT: This is a case in which the defense turned over 3500 material?

MR. FISCHETTI: Absolutely, in accordance with the rules. 3500 material in regard to Mr. Putzel too, I might add.

THE COURT: This is the first time in my experience that that ever happened. Absolutely remarkable.

MR. WILLIAMS: Your Honor, pursuant to this 3500 material I asked my expert about this hum. What he is going to testify to is that when a suction cup is on a phone which is on the hook, the level of hum is very, very high.

THE COURT: That part I don't get. When it is on the hook, do you mean when the phone is hung up?

MR. WILLIAMS: Yes.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	: 91 Cr. 1012 (MBM)
- against -	: ORDER
H. ALAN LEGGE and RICHARD AMSTERDAM	:
Defendants.	:

MICHAEL B. MUKASEY, U.S.D.J.

For the reasons set forth in open Court on July 21, 1992 defendant Amsterdam's motions to dismiss the indictment and for a severance are denied; as is defendant Legge's motion to suppress the September 7, 1992 recording of a telephone conversation between defendant Legge and a confidential informant.

Defendant Amsterdam's motion to dismiss is denied without prejudice to renewal after the completion of the government's case at trial.

SO ORDERED:

/s/ Michael B. Mukasey
Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
July 27, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,	:	S 91 Cr. 1012
	:	(MBM)
v.	:	
	:	July 21, 1992
H. ALLAN LEGGE AND RICHARD AMSTERDAM	:	10:30 a.m.
	:	
	:	
Defendants.	:	

----------X

Before:

HON. MICHAEL B. MUKASEY

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York

MILTON L. WILLIAMS., JR.
Assistant United States Attorney

RON FISCHETTI
Attorney for Defendant Legge
Of counsel

CHARLES ROSS
Attorney for Defendant Ross

(Case called)

MR. WILLIAMS: Government ready.

THE COURT: Is defendant ready?

MR. FISCHETTI: We are, your Honor.

THE COURT: We are here to deal with pretrial motions to suppress a tape of a conversation with Mr. Legge, I believe. Is that right?

MR. WILLIAMS: That's right, your Honor.

THE COURT: And what this case shows me is how uninformed my instincts were, because, frankly, when I first took a look at it, I thought that the motion would have to be granted. After reviewing Duval and other cases, it appears that my instincts were not as well educated as I thought.

I believe it's the flat out holding of Duval that the right to counsel does not attach on the filing of a complaint and the obtaining of a warrant, notwithstanding what I had thought. And obviously, Judge Friendly in the Second Circuit made a policy choice. The policy choice was, if you permit the right to counsel to attach at that point, then the government won't arrest on warrants, they will go out on and arrest on probable cause or lack of it.

That was their choice, and they have since recognized they made that choice in subsequent cases, including O'Hagen and Smith. I don't see a conflict between that decision and Kirby. I understand there is language in Kirby that, without the gloss of Duval, could be interpreted as requiring or saying there is a right to counsel when complaint is filed.

It talks about the initiation of formal proceedings. But, as I read Duval, what Duval means is that the filing of a complaint

and obtaining of a warrant ain't formal proceedings. I'm bound by it. To say I am bound by it is not to say I agree or disagree with it. It is a simple fact that I am bound by it, and, accordingly, have to deny the motion.

Now, with respect to a severance, I think that the conversation fairly interpreted can be read as in furtherance of a conspiracy then ongoing which included as its goal the distribution of proceeds that had not as yet been distributed, so I can't grant a severance on that ground.

What other business do we have to conduct?

MR. WILLIAMS: Your Honor, there was an issue of whether or not a pretrial hearing would be necessary for two particular issues, one for Mr. Amsterdam's postarrest statements and the second as to the audibility and authenticity of the tapes the government intends to play, whether or not that is necessary.

THE COURT: Do I have the tapes?

United States District Court

Southern District of New York

UNITED STATES OF AMERICA

V.

H. Alan Legge

(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: S1 91 Cr. 1012 (MBM) (01)

Ronald P. Fischetti
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☒ was found guilty on count(s) one through seven after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC. Sec. 371	Conspiracy to commit mail fraud.	On or about 9/91	1
18 USC Sec. 1341	Mail Fraud	7/8/87	2
18 USC Sec. 1341	Mail Fraud	4/11/88	3
18 USC Sec. 1341	Mail Fraud	3/7/88	4
18 USC Sec. 1341	Mail Fraud	4/6/90	5
18 USC Sec. 1341	Mail Fraud	2/6/91	6
18 USC Sec. 1341	Mail Fraud	11/23/89	7

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984. AUSA Milton Williams

☐ The defendant has been found not guilty on count(s) ____, and is discharged as to such count(s).

☒ The superseded indictment (is) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay a special assessment of $350.00, for count(s) 1-7, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 044-22-0720

Defendant's Date of Birth: July 14, 1928

Defendant's Mailing Address:

295 Broadwater Way
Gibson Island, MD

Defendant's Residence Address:
Same as above

October 12, 1993
Date of Imposition of Sentence

/s/
Signature of Judicial Officer

Michael B. Mukasey, U.S.D.J.
Name & Title of Judicial Officer

October 18, 1993
Date

No. 94-879

In the Supreme Court of the United States

OCTOBER TERM, 1994

H. ALLAN LEGGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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18 pp

QUESTIONS PRESENTED

1. Whether the filing of a federal felony complaint against petitioner triggered his Sixth Amendment right to counsel.

2. Whether the government adequately established the authenticity of a tape recording of a telephone conversation between a government informant and petitioner.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Forte v. *State*, 707 S.W.2d 89 (Tex. Ct. Crim. App. 1986)	7
Jones v. *State*, 216 N.W.2d 224 (Wis. 1974)	8
Kirby v. *Illinois*, 406 U.S. 682 (1972)	5, 6
Moran v. *Burbine*, 475 U.S. 412 (1986)	4
People v. *Anderson*, 842 P.2d 621 (Colo. 1992)	7
People v. *Hayes*, 564 N.E.2d 803 (Ill. 1990), cert. denied, 449 U.S. 967 (1991)	7, 8
People v. *Samuels*, 400 N.E.2d 1344 (N.Y. 1980)	7
United States v. *Ash*, 413 U.S. 300 (1973)	5
United States v. *Biggins*, 551 F.2d 64 (5th Cir. 1977)	9, 12
United States v. *Black*, 767 F.2d 1334 (9th Cir.), cert. denied, 474 U.S. 1022 (1985)	9
United States v. *Branch*, 970 F.2d 1368 (4th Cir. 1992)	9, 12
United States v. *Buchanan*, 985 F.2d 1372 (8th Cir. 1993), cert. denied, 114 S. Ct. 2727 (1994)	11, 12
United States v. *Cianfrani*, 573 F.2d 835 (3d Cir. 1978)	11
United States v. *Degaglia*, 913 F.2d 372 (7th Cir. 1990)	11
United States v. *Duvall*, 537 F.2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976)	4, 6, 7
United States v. *Fuentes*, 563 F.2d 527 (2d Cir.), cert. denied, 434 U.S. 959 (1977)	12
United States v. *Gouveia*, 467 U.S. 180 (1984)	5, 6
United States v. *King*, 587 F.2d 956 (9th Cir. 1978)	11, 12
United States v. *Lance*, 953 F.2d 1177 (5th Cir. 1988)	9

Cases—Continued: Page

United States v. *Langley*, 848 F.2d 152 (11th Cir.), cert. denied, 488 U.S. 897 (1988) 6-7
United States v. *Lively*, 803 F.2d 1124 (11h Cir. 1986) 9
United States v. *McKeever*, 169 F. Supp. 426 (S.D.N.Y. 1958), rev'd, 271 F.2d 669 (2d Cir. 1959) 10, 11
United States v. *McMillian*, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) 11
United States v. *Pace*, 833 F.2d 1307 (9th Cir. 1987), cert. denied, 486 U.S. 1011 (1988) 7
United States v. *Ruggiero*, 928 F.2d 1289 (2d Cir.), cert. denied, 113 S. Ct. 372 (1991) 4-5, 9, 11
United States v. *Sandoval*, 709 F.2d 1553 (D.C. Cir. 1983) 11
United States v. *Sivils*, 960 F.2d 587 (6th Cir.), cert. denied, 113 S. Ct. 130 (1992) 11
United States v. *Sliker*, 751 F.2d 477 (2d Cir. 1984), cert. denied, 470 U.S. 1058 (1985) 9
United States v. *Smith*, 692 F.2d 693 (10th Cir. 1982) 12
United States v. *Starks*, 515 F.2d 112 (3d Cir. 1975) 11

Constitution, statutes and rules:

U.S. Const. Amend. IV 3, 4, 5, 6, 7, 8
18 U.S.C. 371 2
18 U.S.C. 1341 2
Fed. R. Evid.:
Rule 104(b) 8
Rule 901 8
Rule 901(a) 4, 8, 9, 12
Fed. R. Crim. P.:
Rule 3 6
Rule 4 6
Rule 7(a) 6

Miscellaneous:

Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* (1984) 7

Miscellaneous—Continued: Page

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-879

H. ALLAN LEGGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A9) is unreported, but the decision is noted at 29 F.3d 621 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1994. A petition for rehearing was denied on August 12, 1994. Pet. App. A1-A2. The petition for a writ of certiorari was filed on November 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to commit mail fraud, in violation of 18 U.S.C. 371, and six counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 48 months' imprisonment, to be followed by three years' supervised release. Gov't C.A. Br. 1-2. The court of appeals affirmed. Pet. App. A3-A9.

1. Petitioner was the president of American Credit Indemnity Co. (ACI), a credit insurance company that provides coverage designed to guarantee the accounts receivable of a seller of merchandise. ACI sold some of its policies through brokers, who ordinarily received a 5% commission on each sale. In 1984, ACI established a "master broker" program that rewarded brokers who brought ten or more clients to ACI with a 12% commission on each sale. Gov't C.A. Br. 3-4.

At the outset of the master broker program, petitioner proposed to Seymour Wilson, the regional vice president of ACI's New York office, that they assign credit insurance policies to phony master brokers who were not responsible for bringing to ACI the clients who purchased the policies, give the phony master brokers a small percentage of the 12% commissions, and obtain for themselves the balance of the commissions as "kickbacks." Pursuant to that scheme, petitioner recruited Richard Amsterdam, Daniel Sullivan, and Arnold Holt to serve as phony master brokers. Between 1984 and May 1991, petitioner and Wilson assigned entities controlled by Amsterdam, Holt, and Sullivan commissions on 220 ACI credit insurance policies. Gov't C.A. Br. 3-5. As a result of the scheme ACI issued $1.5 million in fraudu-

lent commissions, and petitioner received more than $450,000 in kickbacks. *Id.* at 6-7.

In May 1991, during a meeting at ACI headquarters, Wilson admitted his participation in the scheme to company officials. A short time later, he agreed to cooperate with the government in the investigation of petitioner. Gov't C.A. Br. 8. On July 26, 1991, the United States filed a sealed complaint against petitioner charging him with the same fraudulent scheme that later resulted in his indictment. On the same date, the United States obtained a warrant for petitioner's arrest. *Id.* at 12. On September 7, 1991, Wilson recorded a telephone conversation with petitioner. In that conversation, petitioner made several incriminating admissions, urged Wilson to deny any knowledge of the scheme if interviewed by the authorities, and provided Wilson with a cover story for Amsterdam to use to explain his involvement in the master broker program. *Id.* at 8-9.

2. Before trial, petitioner moved to suppress the recording of the September 7, 1991 telephone conversation on the ground that the United States had violated his Sixth Amendment right to counsel by instigating Wilson's contact with him after the government had filed a sealed complaint and obtained an arrest warrant. The district court denied the motion. Pet. App. A21-A23. The court held that the filing of the complaint and the issuance of the arrest warrant did not constitute the formal initiation of judicial proceedings against petitioner and thus that his Sixth Amendment right to counsel had not attached when Wilson initiated the telephone conversation with him. *Id.* at A22-A23.

At trial, the prosecutor showed Wilson a copy of the tape, and Wilson testified that he had listened to it, that he recognized the voices on it, and that the tape fairly and accurately reflected the contents of his conversation

with petitioner on September 7, 1991. Gov't C.A. Br. 22. Petitioner objected to the admission of the tape of the September 7 conversation, arguing that a 2.9-second gap in the tape impugned its accuracy. Wilson testified, however, that he had caused the gap by accidentally depressing the record button on the tape recorder while listening to the conversation. *Id.* at 22-23. The district court admitted the tape. Pet. App. A18, A20. At trial, the government and petitioner each introduced expert testimony regarding the origin and significance of the 2.9-second gap on the tape. Gov't C.A. Br. 10, 11.

3. The court of appeals affirmed. Pet. App. A3-A9. It rejected petitioner's contention that the government violated his Sixth Amendment right when Wilson, a government informant, contacted him by telephone on September 7, 1991, two months after the government filed the sealed complaint and obtained an arrest warrant. Relying on Judge Friendly's opinion in *United States* v. *Duvall*, 537 F.2d 15 (2d Cir.), cert. denied, 426 U.S. 950 (1976), the court held that the filing of a federal complaint does not trigger the Sixth Amendment right to counsel. Pet. App. A4. The court explained that the filing of a complaint does not initiate formal "adversary judicial proceedings" and thus is not a stage of a criminal prosecution at which a defendant requires counsel. Pet. App. A5 (quoting *Moran* v. *Burbine*, 475 U.S. 412, 431 (1986)).

The court of appeals also held that the district court did not abuse its discretion by admitting the September 7, 1991, tape recording. According to the court of appeals, the district court "could properly have found that the Government had met [the] requirement[s] of Fed. R. Evid. 901(a)] and produced 'clear and convincing evidence of authenticity and accuracy.'" Pet. App. A6 (quoting *United States* v. *Ruggiero*, 928 F.2d 1289, 1303

(2d Cir.), cert. denied, 112 S. Ct. 372 (1991)). Petitioner's claim that Wilson had tampered with the tape rested on witness credibility determinations that the district court properly left to the jury. Pet. App. A6.

ARGUMENT

1. Petitioner contends (Pet. 11-21) that the filing of the criminal complaint against him triggered his Sixth Amendment right to counsel and thus that the government violated his right to counsel by having a government informant initiate a telephone conversation with him after the complaint was filed. The court of appeals correctly rejected that claim. The courts are in agreement that a federal felony complaint does not begin formal adversary judicial criminal proceedings, and that the Sixth Amendment right to counsel thus does not attach when a complaint is filed. That question thus warrants no further review.

The Sixth Amendment right to counsel attaches only "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). As this Court has explained, "the 'core purpose' of the counsel guarantee is to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *United States* v. *Gouveia*, 467 U.S. 180, 188-189 (1984) (quoting *United States* v. *Ash*, 413 U.S. 300, 309 (1973)). The Court has extended the counsel guarantee "to certain 'critical' pretrial proceedings," but it has done so only when "'the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.'" *Gouveia*, 467 U.S. at 189 (quoting *Ash*, 413 U.S. at 310). In light of those prin-

ciples, the Court held in *Gouveia* that the right to counsel does not arise at the time of arrest. See 467 U.S. at 190.

The filing of a federal complaint does not begin formal adversarial proceedings and thus the right to counsel does not attach at that time. Under the Federal Rules of Criminal Procedure, a federal prosecution can be initiated only by the filing of an indictment or an information. See Fed. R. Crim. P. 7(a). Complaints and warrants, governed by Federal Rules of Criminal Procedure 3 and 4, in contrast, are categorized under the Rules as "Preliminary Proceedings." Moreover, contrary to petitioner's assertion that "[a] complaint is functionally equivalent to an indictment," Pet. 15, a federal felony complaint serves primarily as a basis for law enforcement authorities to obtain an arrest warrant, and cannot serve as the basis for subjecting the defendant to trial. 8 James Wm. Moore *et al.*, Moore's Federal Practice ¶ 3.02 (2d ed. 1994).[1] Thus, the filing of a complaint alone does not initiate a stage at which the defendant is confronted by judicial proceedings, the intricacies of the law, or the government as a formal adversary. See *Gouveia*, 467 U.S. at 188-189; *Kirby*, 406 U.S. at 689. Every federal court of appeals to have considered the issue has thus held that the government does not trigger a defendant's Sixth Amendment right to counsel by filing a complaint and obtaining an arrest warrant. See, *e.g.*, *United States* v. *Langley*, 848 F.2d

[1] Given the function of a federal criminal complaint in procurement of warrants, Judge Friendly noted in *Duvall* that "to hold that the accrual of the right to counsel is accelerated by use of the warrant procedure would tend to discourage [the authorities from obtaining warrants] whereas the policy should be to encourage [them]." *Duvall*, 537 F.2d at 22.

152, 153 (11th Cir.), cert. denied, 488 U.S. 897 (1988); *United States* v. *Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987), cert. denied, 486 U.S. 1011 (1988); *Duvall*, 537 F.2d at 20-22.

Petitioner identifies no federal appellate decision that conflicts with the Second Circuit's decision here, but contends instead that the decision below conflicts with decisions of several state courts. Pet. 19-21. That "apparent split of authority," however, "is explainable by the fact that [a complaint] is used for multiple purposes," and in some jurisdictions can serve as a formal charging document. Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.4, at 467 (1984). Each of the state cases upon which petitioner relies arose in a jurisdiction in which a complaint plays a role in initiating an adversary criminal proceeding that it does not play under federal law. In New York, for example, as the New York Court of Appeals explained in *People* v. *Samuels*, 400 N.E.2d 1344, 1346 (1980), a criminal complaint is "an accusatory instrument," which "[b]y statute" commences a criminal action. See also *Forte* v. *State*, 707 S.W.2d 89, 92 (Tex. Ct. Crim. App. 1986) (because "formal adversary [judicial] proceedings" were not initiated until a complaint was filed, defendant's decision to give a breath sample to the police at an earlier time was not a critical stage at which the Sixth Amendment right to counsel attached); *People* v. *Anderson*, 842 P.2d 621, 623 (Colo. 1992) (suggesting that a complaint is equivalent to an information under state law).[2]

[2] Petitioner also relies on *People* v. *Hayes*, 564 N.E.2d 803 (Ill. 1990), cert. denied, 449 U.S. 967 (1991), but that decision supports the position taken by the court of appeals. In *Hayes*, the Supreme Court of Illinois held that the filing of a complaint does not constitute the initiation of formal adversary proceedings unless the circumstances surrounding its issuance show that "the State's

2. Petitioner also contends (Pet. 21-25) that the district court erred in finding that the September 7, 1991, tape recording satisfied the authentication requirements of Federal Rule of Evidence 901. That contention does not warrant further review.

Federal Rule of Evidence 901 sets forth the authentication requirements for evidence that a party seeks to introduce in a federal trial. Rule 901(a) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Rule treats preliminary questions of authentication and identification as matters of conditional relevance according to the standards of Federal Rule of Evidence 104(b).[3] See 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Evidence* ¶ 901(a)[01], at 901-15 (1994). Thus, as a threshold matter, to introduce evidence under Rule

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prosecutorial forces have focused upon the accused," which the court in that case held had not yet occurred upon the filing of the complaint. 564 N.E.2d at 818. Petitioner's reliance on *Jones* v. *State*, 216 N.W.2d 224 (Wis. 1974), also is unavailing. In that case, no complaint had been filed against the defendant and therefore the Supreme Court of Wisconsin did not have to decide whether the filing of a complaint triggered the Sixth Amendment right to counsel. In any event, the decision in *Jones* rests on a Wisconsin complaint, not a federal one. *Id.* at 227 (explaining that, in Wisconsin, "the substantial equivalent of the federal post-indictment stage began after the issuance of the warrant or complaint").

[3] Rule 104(b) states:

> When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

901(a) the proponent need only provide "sufficient proof * * * that a reasonable juror could find in favor of authenticity." *Weinstein's Evidence, supra*, ¶ 901 (a)[01], at 901-19 (1994). The question whether sufficient proof was offered to support admission of the evidence is within the discretion of the district court. See *United States* v. *Ruggiero*, 928 F.2d 1289, 1303 (2d Cir.), cert. denied, 112 S. Ct. 372 (1991); *United States* v. *Biggins*, 551 F.2d 64, 66 (5th Cir. 1977). The ultimate determination of authenticity, turning on issues of credibility and probative force, is then left to the jury. *Weinstein's Evidence, supra*, ¶ 901(a)[01], at 901-17. See also *United States* v. *Branch*, 970 F.2d 1368, 1370-1371 (4th Cir. 1992); *United States* v. *Black*, 767 F.2d 1334, 1342 (9th Cir.), cert. denied, 474 U.S. 1022 (1985); *United States* v. *Sliker*, 751 F.2d 477, 499 (2d Cir. 1984), cert. denied, 470 U.S. 1058 (1985).

Here, the government satisfied the initial requirement of Rule 901(a) through the testimony of Seymour Wilson, who made the tape recording of his September 7, 1991, telephone conversation with petitioner. Wilson testified that he had listened to the recording, that he recognized the voices on it, and that the tape fairly and accurately reflected the contents of his conversation with petitioner on that date. The government thereby sustained its burden to make a prima facie showing that the tape was a recording of the September 7, 1991, conversation between petitioner and Wilson. In view of that evidence, the district court did not abuse its discretion by admitting the tape. See *United States* v. *Lance*, 853 F.2d 1177, 1181-1182 (5th Cir. 1988) (holding that tape was adequately authenticated by testimony of a co-conspirator who had become a government informant); *United States* v. *Lively*, 803 F.2d 1124, 1129 (11th Cir. 1986) (holding that tape was properly admitted despite seven-second gap).

The questions raised by petitioner regarding the tape's authenticity were properly left to the jury. Petitioner contended that the 2.9-second gap in the tape showed that it had been tampered with. Petitioner introduced evidence, including expert testimony, regarding the accuracy and authenticity of the tape. The jury was entitled to credit petitioner's evidence to the degree it was persuaded by it; it could have entirely disregarded the tape recording if it found that the evidence showed it to be unauthentic, and conversely, the jury was free to rely on the tape if it found it to be authentic and persuasive. In sum, the district court correctly allowed the jury to consider the tape, and petitioner does not contend that the jury erred in assessing its probative value.

Petitioner contends that review is warranted because the courts of appeals are divided between those that require, as a condition of admission, proof of the seven elements set forth in *United States* v. *McKeever*, 169 F. Supp. 426, 430 (S.D.N.Y. 1958), rev'd on other grounds, 271 F.2d 669 (2d Cir. 1959), and those, such as the Second Circuit in this case, that take a more flexible approach to the admission of tape recordings. The minor differences among the courts of appeals concerning the standard for authentication of tape recordings do not amount to a conflict warranting this Court's review.

In *McKeever*, the court held that the proponent of a tape recording must establish the following seven facts: (1) that the recording device was capable of taping the conversation offered in evidence; (2) that the operator of the device was competent to operate it; (3) that the recording was authentic and correct; (4) that changes, additions, or deletions had not been made in the recording; (5) that the recording was preserved in a manner that is shown to the court; (6) that the speakers

have been identified; and (7) that the conversation elicited was made voluntarily and in good faith, without any kind of inducement. *McKeever*, 169 F. Supp. at 430. In *United States* v. *McMillian*, 508 F.2d 101, 104 (1974), cert. denied, 421 U.S. 916 (1975), the Eighth Circuit adopted the *McKeever* factors, and it continues to adhere to them. See *United States* v. *Buchanan*, 985 F.2d 1372, 1378 (8th Cir. 1993), cert. denied, 114 S. Ct. 2727 (1994).[4]

Other courts have taken a more flexible approach, allowing the admission of tape recordings as long as the proponent shows their accuracy and authenticity. See, *e.g.*, *United States* v. *Sivils*, 960 F.2d 587, 597 (6th Cir.), cert. denied, 113 S. Ct. 130 (1992); *United States* v. *Ruggiero*, 928 F.2d at 1303; *United States* v. *Degaglia*, 913 F.2d 372, 375 (7th Cir. 1990); *United States* v. *Sandoval*, 709 F.2d 1553, 1554-1555 (D.C. Cir. 1983); *United States* v. *King*, 587 F.2d 956, 961 (9th Cir. 1978);

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[4] The Eighth Circuit does not, however, rigidly apply those factors. In *Buchanan*, for example, the court held that the mere existence of the tape rendered unnecessary any showing on the first *McKeever* factor—the capability of the recording device. 985 F.2d at 1379.

Petitioner contends (Pet. 22) that the Third Circuit also applies the *McKeever* factors. In *United States* v. *Starks*, 515 F.2d 112, 121 (3d Cir. 1975), on which petitioner relies, however, the Third Circuit stated only that the *McKeever* factors are "useful." Petitioner also cites *United States* v. *Cianfrani*, 573 F.2d 835, 842-843 (3d Cir. 1978), but that decision did not review the admission of evidence or apply *McKeever*; rather, it involved an attempt by news organizations to unseal the record of an evidentiary hearing in which evidence was suppressed. *McKeever* was mentioned to only as part of the factual background to the unsealing claims. Moreover, the court in *Cianfrani* characterized *Starks* as "recommend[ing]" that one of the *McKeever* factors be proved as a condition of admissibility. 573 F.2d at 842. Petitioner cites no Third Circuit case that requires use of the *McKeever* factors.

United States v. *Biggins*, 551 F.2d at 67. Although those courts often rely on the factors identified in *McKeever*, they eschew an approach that even petitioner concedes is "mechanical," Pet. 23, because "the varying circumstances of particular cases * * * militate against [the] adoption of inflexible criteria applicable to all cases." *United States* v. *Fuentes*, 563 F.2d 527, 532 (2d Cir.) (*McKeever* factors are "a valuable formulation of the factors a trial judge should consider"), cert. denied, 434 U.S. 959 (1977). See also *United States* v. *Branch*, 970 F.2d at 1371-1372 (*McKeever* factors "provide guidance"); *United States* v. *Smith*, 692 F.2d 693, 698 (10th Cir. 1982) (quoting *Fuentes*); *Biggins*, 551 F.2d at 67 (using *McKeever* factors, but not requiring "[s]trict compliance"); *United States* v. *King*, 587 F.2d at 961 (*McKeever* elements "are useful, but not dispositive, guidelines").

Moreover, *McKeever* was decided long before the promulgation of the Federal Rules of Evidence in 1972 and before the admission of tape recordings had become commonplace. Thus, although some of the *McKeever* factors remain relevant, others have limited continuing utility. For example, the government rarely will be able to establish that a tape recording is what it claims it to be without establishing the identity of the speakers and the accuracy of the tape. On the other hand, as even the Eighth Circuit has acknowledged, there is no reason to insist on explicit proof that the recording device was capable of making the recording, because the fact that "the tape recording exists" adequately demonstrates the capability of the recorder. *United States* v. *Buchanan*, 985 F.2d at 1379. Similarly, the process of tape recording has become simplified, so proof of the competency of the recorder's operator is often unnecessary. In sum, the flexible approach taken by the majority of the courts of

appeals takes into account the relevant *McKeever* factors and suffices to satisfy the generous standard of admissibility under Federal Rule of Evidence 901(a). Accordingly, there are no meaningful differences in the standards of admissibility set by the courts of appeals, and review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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